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No. 84-1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WATSON MARINE SERVICE, INC.,
Appellant-Petitioner,

v.

KLIEBERT EDUCATIONAL TRUST AND
TIMOTHY A. BECNEL INTER VIVOS TRUST,
Appellee-Respondent.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE TO DISMISS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA JURISDICTIONAL STATEMENT OR TO AFFIRM THE JUDGMENT OF THE STATE COURT

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QUESTIONS PRESENTED

This appeal tries to raise the following questions as set forth by the Appellant:

1. Where, at the time appellant-petitioner's anchor pilings were placed in the bed of the Mississippi River adjacent to or adjoining appellee-respondent's riparian property, the State of Louisiana, acting through its duly authorized South Louisiana Port Commission, did not require that persons constructing such work obtain a state permit, and subsequent Port Commission regulations requiring a permit contained a grandfather clause exempting existing works, do these riparian landowners have standing, under federal or state law, to bring a private right of action in state district court to force the removal of anchor pilings constructed pursuant to a valid permit issued by the Army Corps of Engineers?

2. Where a state statute purports to grant to each riparian landowner the exclusive right to erect and maintain works or structures in that portion of the Mississippi River bed adjacent to or adjoining his riparian land, as well as the accessory right to prohibit and prevent others from using the bed of the river adjacent to or adjoining his riparian land for navigational activities which promote and further interstate commerce, unless the user pays each such riparian landowner the rent he arbitrarily demands, regardless of the reasonableness of the rental amount or other lease terms fixed by the riparian landowner; is the state statute an unconstitutional interference with Congressional power to regulate commerce "among the several states because its application constitutes a substantial impediment to the free flow of commerce across state lines?

3. Where a state statute purports to grant each riparian landowner the exclusive right to erect and maintain works or structures in that portion of the Mississippi River bed adjacent to or adjoining his riparian land, as well as the accessory right to prohibit and prevent others from using the bed of the river adjacent to or adjoining his riparian land for navigational activities which promote and further interstate commerce, unless the user pays each such riparian landowner the rent he arbitrarily demands, regardless of the reasonableness of the rental amount or other lease terms fixed by the riparian landowner, does the state statute unconstitutionally interfere or conflict with Congressional power to regulate the local incidents of interstate commerce, in cases such as this one, where the class of acts involved are nationally significant in their aggregate economic effect.

4. Where the interpretation and application of L.S.A.-R.S. 9:1102.1 retards, impedes, burdens or otherwise constitutes an obstacle to the accomplishment and execution of the full purposes, objectives and intentions of Congress in enacting the River's and Harbors Act of 1899, must the state statute be held void, even if enacted by the Louisiana Legislature for a valid purpose and without the intention of frustrating federal law or federal policy?

5. Does L.S.A.-R.S. 9:1102.1, by purportedly granting riparian landowners of their lessees the exclusive right to place constructions in the bed of a navigable river adjacent to or adjoining their riparian property, constitute an alienation of the bed of a navigable river in violation of Article IX, Section 3 of the Louisiana Constitution of 1974?

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The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Louisiana on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATUTES

The pertinent Louisiana statute involved is L.S.A.-R.S. 9:1102.1 which reads as follows:

> A. Riparian owners and their lessees of property on navigable rivers, lakes, or streams within the limits of any deep water port commission of this state or, in the absence of any such commission, within a municipality having a population in excess of five thousand inhabitants, shall have the right to erect and maintain on the batture or banks owned or leased by them and in the bed of the navigable river, lake, or stream adjacent to or adjoining such batture or banks, such wharves, buildings, or improvements as may be required for the purposes of commerce, navigation, or other public purposes. However, where such owners first have obtained the consent of the governing authority of the deep-water port commission, which consent each deep-water port commission is hereby authorized to grant, or of the municipality, as the case may be, to erect such wharves, buildings, or improvements, and same are erected in conformity to plans and specifications which have been approved by such governing authorities, those governing authorities may expropriate said wharves, buildings, or improvements whenever said improvements or the riparian front shall be required for public purposes, and the owners shall be entitled to claim compensation to the full extent of their loss, but where such consent and approval is not obtained, the owners shall be entitled to be paid compensation therefor to the full extent of their loss or required to remove such wharves, buildings, or improvements at their own expense, in the discretion of the governing authority of the deep-water port commission or of the municipality. In all cases, such wharves, buildings, or improvements shall remain subject to the administration and control of the governing authorities

with respect to their maintenance and to the fees and charges to be exacted for their use by the public.

B. Nothing herein shall deprive the levee boards of their authority with respect to levees in their respective districts or their right to appropriate, without compensation, such wharves, buildings, or improvements.

PROCEEDINGS BELOW

The Supreme Court of the State of Louisiana denied appellant-petitioner's application for Writ of Certiorari or writ of Review to the Louisiana Court of Appeal for the State of Louisiana on November 2, 1984. A copy of the Supreme Court of Louisiana decision is attached to the Jurisdictional Statement filed by Appellant and marked as Appendix A.

On July 30, 1984, the 5th Circuit Court of Appeal for the State of Louisiana affirmed the judgment of the 23rd Judicial District Court for the Parish of St. James. A copy of the Fifth Circuit Court of Appeal decision is attached to Appellant's Jurisdictional Statement as Appendix B. The district court found that Watson Marine Services, Inc. was operating a warehousing operation for barges while in storage. It also found that the warehousing opertion being conducted by Appellant concerned the bed of a stream and not its navigability or its use as a highway of commerce. The court further found that Watson Marine Services, Inc. had not complied with the permit issued by the U.S. Corps of Engineers as they had not obtained authorization from riparian landowners.

ARGUMENT

The Case Presents No Substantial Federal Question.

Appellant claims jurisdiction of this Court pursuant to the provisions of Title 28, United States Code, Section 1257(2).

1.

The first issue raised by Appellant is whether riparian landowners have a right to bring an action under state or federal law to remove works from the bed of a navigable river when the works have been placed there pursuant to a valid Corps of Engineers permit.

First, the district court found that the permit specifically required approval from riparian landowners and that Watson had failed to do this. See Reasons For Judgment attached hereto as Appendix "A". Furthermore, the permitting process by the Corps is designed only to protect an impediment to navigation.

Second, the trial court found Watson's activities to be outside of navigation. The barges were being stored and warehoused. The control and ownership of the beds of navigable streams remains with the State and the joint assent of the Corps of Engineers is necessary only as to the effect the erection of a structure has with relation to navigability.

In essence, the Appellant seeks to appropriate the rights of riparian owners and of the public to free navigation and commerce for its personal business of storing and warehousing in the name of deprivation of free navigation, when in fact, as found by the state courts it is Appellant's use for his personal benefit

which impinges on free navigation. The U.S. Army Corps of Engineers' permit allows this impediment to free navigation but specifically required the Appellant to seek approval from the riparian owners, and it is that approval that this Appellant has failed to obtain.

The opinion of the Fifth Circuit Court of Appeal is adopted herein by reference for its statement on the necessity of joint assent by the State and Federal Government.

2.

The second allegation by the Appellant concerns rent to be paid by Watson Marine Services, Inc. which is an impediment to the free flow of commerce. This case was solely concerned with an injunction and there have been no allegations or demands for rent being made that are contained in the record. Again, the district court found the activity to be outside navigation. Watson Marine Services, Inc. and others can navigate all day long but they cannot set up a warehousing operation that blocks ingress and egress to a riparian landowners' property.

3.

Issues 3, 4 and 5 as presented by Appellant are repetitious in and of themselves and in conjunction with issues one and two. The reasons for judgment given by the trial court and his finding of facts and the law as stated by the 5th Circuit Court of Appeal properly set forth the law as applied to the facts in this case.

4.

Appellant, Watson Marine Services, Inc., makes an attempt to bring this case within the jurisdiction of this Court by claiming that the decisions of the several courts below are repugnant to the Constitution, treaties or law of the United States. The only assertion by Appellant is that since it had a valid permit from the Corps of Engineers, that the law of Louisiana could not interfere with its activities.

It is well recognized that the construction of wharves, anchorages or other structures within any port area in Louisiana requires the concurrent consent of Louisiana and the United States. *Cummings* v. *Chicago,* 188 U.S. 410, 23 S. Ct. 472, 47 L.Ed. 525 (1903); *North Shore Boom and Driving Co.* v. *Nicomeu Boom Co.,* 212 U.S. 406, 29 S. Ct. 355, 53 L.Ed. 574 (1909); *In Re Silver Bridge Disaster Litigation,* 381 F. Supp. 931 (S. D. West Vir. 1974); *Zabel* v. *R. P. Tabb* 296 F. Supp. 764 (M.D. Fla. 1969); La. Civ. Code Arts. 450, 452, 458; 33 U.S.C.A.: 401, 403.

This Court, in *Cummings,* supra, interpreted the federal statute that Appellant relies upon, the tenth section of the Rivers and harbors Appropriations Act of 1899 (33 U.S.C.A.: 401, 403), hereinafter referred to as the "Act". The issue presented in *Cummings* was whether Congress had intended to ignore the wishes of the State of Illinois by authorizing the Secretary of War to issue a permit for a construction in a navigable waterway wholly within the borders of Illinois. This Court stated:

> . . . The effect of that act reasonably interpreted is to make the erection of a structure in a navigable river, within the limits of a State depend

> upon the concurrent or joint assent of both the National Government and the State Government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies. 188 U.S. at 431, 23 S. Ct. at 477.

The *Zabel* case, supra, acknowledged the rule in *Cummings,* i.e., requiring approval from local agencies, as well as Federal agencies, to be one as to which the parties could not take issue. 296 F. Supp. at 765. A permit issued by the federal government ". . . merely expresses the assent of the Federal government so far as concerns the public rights of navigation . . ." but in no way does" . . . it obviate the necessity of obtaining State assent to the work authorized . . ." *Norfolk Dredging Company* v. *Radcliff Materials, Inc.,* 264 F. Supp. 399, 401 (E.D. Vir. 1967).

The above quotation from the *Norfolk* case not only follows the clear intent of Congress and this Court but was the exact language of the permit granted the plaintiff in this case by the U.S. Army Corps of Engineers.

The Louisiana Court in this present case have only affirmed the proposition that both state and federal assent are necessary. It was then found that under Louisiana's property law, Appellant-Watson Marine Services, Inc. committed a trespass on the riparian owners rights and have in fact blocked ingress and egress from their land into the navigable water.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or in the alternative, to affirm the judgment entered by the Court below. The decision below only reiterates this Court's prior decisions on joint assent and based upon that, ruled on the applicable state law, independent of any federal concerns and found in favor of Appellee on the State grounds. Appellant has failed to show any burden or interstate commerce, but has only shown a burden on a private enterprise that rents spaces to warehouse barges.

Respectfully submitted,

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APPENDIX

APPENDIX A

23RD JUDICIAL DISTRICT COURT

PARISH OF ST. JAMES
STATE OF LOUISIANA

Number 15,683

KLIEBERT EDUCATIONAL TRUST, et al

versus

WATSON MARINE SERVICES, INC. et al

REASONS FOR JUDGMENT

Plaintiffs, owners of adjacent tracts of land fronting on the Mississippi River in St. James Parish, filed this suit against Watson Marine Services, Inc., and two other parties seeking to enjoin them from conducting certain barge operations in front of their properties. In addition to alleging their ownership of the lands and the presence of the barges in the front thereof, it is also alleged that defendants have caused mooring anchors and floating buoys to be installed offshore and in front of their properties without having obtained permission. The suit seeks a rule to show cause why an injunction should not issue and the ultimate prayer is for judgment enjoining the barging operation as well as the removel of the anchors and buoys all of which block ingress and egress to their river frontage. Two of the original parties defendant were dismissed leaving Watson as the sole party against whom relief is sought.

The testimony adduced, together with admissions contained in the pleadings and the briefs filed, support the establishment of the following facts:

There is no question but that the plaintiffs are the owners of their respective properties, as alleged. Watson Marine is engaged in what is known as a barge fleeting operation which is conducted in the Convent area of St. James Parish in the Mississippi River on both sides of as well as in front of the lands abutting the river owned by the plaintiffs. A barge fleeting operation is in the nature of or may be considered as a warehousing operation whereby Watson Marine assumes responsibility for the storage and handling of barges, during the delays necessary, in order to get their cargo shifted to ocean going vessels, through such time as the barges may be put back into use. In order to harbor these barges, Watson Marine has constructed along the east bank of the Mississippi River in the Convent area, a series of mooring anchors or pilings. Each of these is placed in the bed of the river and to it is attached a chain to the other end of which is attached a buoy which floats on the surface of the river. To this end of the chain the barges are secured and they are then stretched either singley or abreast along some 8,000 feet of the river in the area mentioned.

Watson Marine caused an anchor piling to be placed in front of plaintiffs' properties. This was done without approval or permission of the plaintiffs, but solely by the authority of a permit issued by the United States Corps of Engineers to Ryan-Walsh Stevedoring Company and assigned ultimately to Watson Marine. Not only is the anchor piling situated in front of the lands belonging to the plaintiffs but also the buoy and barges as well.

The defendant urges the following defenses:

1) That the use of a summary procedure is inappropriate.

2) That plaintiffs have neither a right nor a cause of action, any such rights seeking the removal of the offending anchor and buoy being reserved to the United States Corps of Engineers, the South Louisiana Port Commission or the State of Louisiana and not the plaintiffs, and,

3) That the conduct of the defendant is appropriate.

Logically, it would appear that the issues presented should be resolved by first addressing the matters raised by defendant's exception of no right or cause of action for, obviously, if the law does not afford to these plaintiffs the relief they ultimately seek then neither the procedural method employed nor the appropriateness of defendant's actions would be of any consequence.

Briefly stated, the plaintiffs assert that they, and they alone, have the sole and exclusive right and authority to use their river front in the manner used by the defendant and that the unauthorized use thereof by the latter constitutes a trespass, relief from which can and should be afforded by injunction. In this connection they rely upon the provisions of R. S. 9:1102.1 (A), the pertinent provisions of which provide as follows:

> "A. *Riparian owners* and their lessees of property on navigable rivers, lakes, or streams within the limits of any deep water port commission of this state or, in the absence of any such commission, within the municipality having a population

> in excess of five thousand inhabitants, *shall have the right to erect and maintain on the batture or banks owned or leased by them and in the bed of the navigable river, lake or stream adjacent to and adjoining such batture or banks,* such wharves, buildings, or improvements as may be required for the purposes of commerce, navigation, or other public purposes . . ." (Emphasis added).

There is no question but that the properties with which we are here concerned are within the limits of the South Louisiana Port Commission. In conformity with the provisions of the above quoted statute, the South Louisiana Port Commission (the deep water port commission having authority in St. James Parish) has adopted certain rules and regulations, (a copy thereof being attached to the pleadings herein as Addendum No. 1) for its permit procedures.

Under these procedures, the defendant or anyone else, before erecting any structures in the river or its bed, would be required to comply with Sec. III (3) as follows:

> "If the applicant is *other* than the *owner, a copy of the deed of the owner with a certified copy of the lease or permit from the owner by which he conveys his rights to the applicant.*" (Emphasis added).

Defendant contends that the above statutory provisions are not determinative of the issues presented here, it being their contention that the right to regulate the navigability and the bed of the Mississippi River lies in the United States and particularly its Corps of Engineers by virtue of the provision of 33 USC Sec. 10

which provides that "all the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."

It appears that upon the admission of Louisiana into the Union in 1812 Congress did not address the issue of ownership of the lands under the navigable rivers, lakes and streams of the state. *A. N. Yiannopoulos, Property* Sec. 41 n. 2 *Louisiana Civil Law Treatise* 109 (1980); see also Notes, and *Civil Law Property, Beds of Navigable Waters, Susceptibility of Ownership,* 15 La. Law Review 463 (1954-55); Comments, *The Public and the Private Domains of the State,* 12 Tulane Law Review 428 (1938); and *Ownership of the Beds of Navigable Lakes,* 21 Tulane Law Review 454, 457 (1947). The only reference by Congress to the control or ownership of the navigable rivers in Louisiana, in particular, the Mississippi River, provide that: "The River Mississippi and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and forever free . . ." Act of April 14, 1812, c. 57, 2 Stat. 641, 642, 703. Given the foregoing language, the matter of whether the State owned the beds of navigable rivers because a matter of the State's discretion. See A. N. Yiannopoulos, supra at Sec. 41, page 110-11. The Courts of Louisiana, applying LSA CC Article 453, have stated clearly that the beds of navigable rivers are insusceptible of private ownership and are owned by the state. See *Wemple v. Eastham, State v. Richardson,* and also *Miami Corporation v. State.* The provisions of R. S. 9:1102.1(A) and the rules of the South Louisiana Port Commission are consistent with this jurisprudence.

In spite of the foregoing, defendant asserts that it has a right to conduct its operations, which right is to be found in the permit granted by the United States Corps of Engineers to Ryan-Walsh Stevedoring Company, Inc., and by the latter assigned to it. Examination of the latter assignment however finds the following provisions:

> "2. Installation of anchor piles and mooring buoys shall be made only in areas for which *Watson has obtained batture leases and/or specific authorization of the riparian landowner.*" (Emphasis added).

The underscored portion of the foregoing has not been complied with. From the above this Court concludes that:

1) The United States, through its Corps of Engineers, while it has the power to regulate the navigability aspects of the Mississippi River does not have power with respect to its bed, the latter being vested in the State of Louisiana. The "warehousing" operation being conducted here concerns the bed of the stream and not its navigability or its use as a highway of commerce.

2) The defendant cannot rely on such rights as the Corps of Engineers could grant them for the further reason that they have failed to comply with the requirement that authorization be obtained from the riparian landowners which are contained in both the assignment and rule of the port commission found above.

3) That the plaintiffs have real rights granted to them by the statutes and jurisprudence set forth

above that are the subject of protection by injunctive relief.

Having concluded that the exceptions of no right or cause of action are without merit and that the actions of defendant are without legal sanction and in violation of the rights of plaintiffs, the Court now addresses itself to the questions raised by the exception of improper use of summary procedure. This defense was raised for the first time on the morning of the hearing at which time it was argued and overruled. After the exception was overruled the defendant then proceeded to trial without apparant difficulty. Witnesses, expert and otherwise, were called and testified and other evidence introduced. There is neither allegations nor showing that any disadvantage resulted and no appelate relief has been sought with respect to the Court's ruling.

The Court concludes that plaintiffs have alleged, and proved a trespass that defendant has not been prejudiced by the procedural method employed and that, therefore, plaintiffs are entitled to the relief for which they have prayed. Such relief, however, will be limited to a preliminary injunction at this time rather than a permanent injunction as prayed for.

Judgment in according with the foregoing has been handed down this date.

Napoleonville, Louisiana, this 4th day of August, 1983.

/s/ Leon J. LeSueur
Judge Div. A